

Supreme Court No. 20130290

Criminal No. 09-2012-CR-04235

NORTH DAKOTA SUPREME COURT

State of North Dakota

Appellee

v.

Todd Michael Zeller,

Appellant

Appeal from the Criminal Judgment and Commitment entered on September 03,
2013, in District Court, Cass County, North Dakota

BRIEF OF APPELLEE

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[¶3] STATEMENT OF THE ISSUES

- I. [¶4] Whether there was probable cause for the issuance of the search warrant.
- II. [¶5] Whether the district court erred in denying Zeller's motion to suppress because Detective Witte's Exhibit B was false and misleading.
- III. [¶6] Whether there was probable cause for nighttime service of the search warrant.

[¶7] STATEMENT OF THE CASE

[¶8] This is an appeal from the judgment of conviction entered in Cass County District Court on September 3, 2013, before the Judge John Irby after a conditional guilty plea. (Appellant's App. at 27, 30-33). The Appellant, Todd Zeller, (hereinafter, "Zeller") specifically reserved the right to appellate review of the adverse rulings on his motions to suppress (Appellant's App. at 28).

[¶9] On November 17, 2012, Detective Witte of the Fargo Police Department obtained a search warrant for Zeller's residence. (5/7/13 Tr. 6:18-21.) The warrant indicated nighttime service of the warrant was allowed. (Appellant's App. at 13; 5/7/13 Tr. 7:19-20.) Judge Steven Marquart authorized the search warrant around 3:25 a.m. and it was executed around 4:05 a.m. (Appellant's App. at 13; 5/7/13 Tr. 9:13-15.) The search produced numerous controlled substances and Zeller was subsequently charged with nine controlled substance possession felonies and one misdemeanor possession of paraphernalia. (Appellant's App. at 7-9).

[¶10] Zeller filed a motion to suppress on January 14, 2013, arguing the search warrant was not supported by probable cause. (Appellant's App. at 10-11.) Zeller also contested the probable cause supporting the issuance of the nighttime search provision. (Appellant's App. at 10-11). A hearing on this motion to suppress was held on May 7, 2013. (Appellant's app. at 5.) At the hearing Detective Bret Witte testified and was subject to cross-examination by Zeller's counsel. Judge Irby denied the motion to suppress in his Memorandum Opinion and Order Denying the Motion to Suppress dated June 7, 2013. (Appellant's App. at 18-23.)

[¶11] Zeller filed another motion to suppress to request a Franks analysis be applied to the search warrant on July 12, 2013. (Appellant's App. at 24.) Oral argument was held on July 29, 2013. (Appellant's App. at 25.) Judge Irby denied this motion in his Order Denying Motion dated August 5, 2013. (Appellant's App. at 25-26).

[¶12] On September 3, 2013, Zeller entered a conditional guilty plea reserving his right to appeal the denial of both motions to suppress. (Appellant's App. at 28.) He was sentenced that same day, and this appeal followed. (Appellant's App. at 30-38.)

[¶13] **STATEMENT OF FACTS**

[¶14] On November 17, 2012, Detective Witte successfully applied for a warrant to search Todd Zeller's home following a controlled purchase of methamphetamine near Zeller's residence at 114 24th Street South, Fargo, ND,

58103. (5/7/13 Tr. 6:18-21.) Witte set forth the facts and circumstances in support of the search warrant in Exhibit B attached to his Application and Affidavit for Search Warrant. (Appellant's App. 15-17.) The methamphetamine transaction occurred between the hours of 10 p.m. and 11 p.m. on November 16, 2012. (Appellant's App. at 16.) Judge Marquart approved the search warrant application at 3:25 a.m. on November 17, 2012. (Appellant's App. at 13.) Witte and other officers executed it at 4:05 a.m. on November 17, 2012. (5/7/13 Tr. 9:13-15.) Witte requested nighttime service based upon officer safety and because the methamphetamine transaction had occurred during the night. (Appellant's App. at 16.) Judge Marquart approved nighttime service of the warrant. (Appellant's App. at 13.) While executing the warrant, officers obtained a number of incriminating items, and as a result, the Defendant was arrested and charged with several criminal offenses. (Appellant's App. 7-9.)

[¶15] Witte's previous experience with Zeller is documented in his affidavit entitled Exhibit B. (Appellant's App. 15-17.) According to the affidavit, a narcotics investigation into Zeller and his residence of 114 24th Street South, Fargo, ND, 58103, was initially opened in either late 2010 or early 2011. Id. The information gathered could not be corroborated, so the investigation was closed. Id. In July of 2012, a concerned citizen presented complaints via the narcotics tip line about a high volume of short stay, come and go traffic at 114 24th Street South. Id. Based upon this tip and other complaints via the tip line, Witte re-

opened an investigation into Zeller. Id. The concerned citizen provided Witte with license plate numbers for the vehicles frequenting Zeller's residence. Id.

[¶16] One of the license plates provided by the concerned citizen belonged to Jason Gust. (Appellant's App. at 15). Witte testified he has previous experience with Gust and knows he uses methamphetamine. Id. On November 16, 2012, a confidential informant was used to purchase ½ gram of methamphetamine from Gust. Id. The confidential informant was searched before the buy and had nothing on him. Id. After the transaction, Gust drove the confidential informant to the 200 block of 24th Street South, parked very near Zeller's residence, and left on foot to the unknown location to obtain more methamphetamine. Id. Gust was next seen in the alley behind Zeller's residence. Id. He was arrested after the validity of the drugs was confirmed. Id. at 15-16. A search of Gust's car incident to his arrest produced more methamphetamine and drug paraphernalia. Id. at 16. No buy fund money was recovered in the vehicle or on any of the vehicle's occupants. Id. Gust's phone was searched and a recent text message had been received by a "Todd Z," asking if Gust was close to the area. Id. Fargo Police records indicated the number was connected to Todd Zeller of 114 24th Street South. Id.

[¶17] **STANDARD OF REVIEW**

[¶18] This Court reviews the sufficiency of information before a magistrate independent of the trial court's decision and uses the totality-of-the-circumstances test. State v. Rydberg, 519 N.W.2d 306, 308 (N.D. 1994).

Although each bit of information . . . , by itself, may not be enough to establish probable cause and some of the information may have an innocent explanation, ‘probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers . . . which is not weighed in individual layers but in the “laminated” total.’

State v. Damon, 1998 ND 71, ¶7, 575 N.W.2d 912 (citations omitted). “Whether probable cause exists to issue a search warrant is a question of law.” State v. Thieling, 2000 ND 106, ¶ 8, 611 N.W.2d 861. Questions of law are fully reviewable. State v. Wanzek, 1999 ND 163, ¶ 5, 598 N.W.2d 811.

[¶19] The Court will generally defer to a magistrate’s determination of probable cause if a substantial basis for the conclusion exists, and doubtful or marginal cases should be resolved in favor of the magistrate’s determination. State v. Ballweg, 2003 ND 153, ¶ 12, 670 N.W.2d 490. The Court defers to the trial court’s findings of fact and resolves conflicts in testimony in favor of affirmance. State v. Haverluk, 2000 ND 178, ¶ 7, 617 N.W.2d 652.

[¶20] **LAW AND ARGUMENT**

I. [¶21] **Whether the search warrant was supported by probable cause.**

[¶22] Zeller argues the search warrant was not supported by probable cause because Det. Witte failed to establish the credibility of his informants. Zeller seems to attack the credibility of the concerned citizen reporting suspicious behavior at Zeller’s residence and the confidential informant used during the controlled buy. The Court should reject both arguments.

[¶23] Witte's Exhibit B attached to his Application and Affidavit for Search Warrant established a) that the vehicles of two (2) methamphetamine users were parked in the vicinity of 114 24th Street South in the summer of 2012; b) on 16 November 2012 John Gust parked near 114 24th Street; c) Gust said to a confidential informant that he was going to meet his "dealer" to get more methamphetamine; d) the confidential informant purchased from Gust what was field tested as methamphetamine; e) Detective Christensen saw Gust in the alley behind 114 24th Street South; f) the money which the Fargo Police Department had provided to the confidential informant for the purchase of methamphetamine from Gust was not found on Gust after he was arrested; g) Gust's cell phone contained a recent message from "Todd Z" at (701) 238-1993; and, h) Fargo Police Department records indicated that the phone number for Todd Zeller was (701) 238-1993 and that he lived at 114 24th Street South.

[¶24] "[P]robable cause to search exists if it is established that certain identifiable objects are probably connected with criminal activity and are probably to be found at the present time at an identifiable place." State v. Ringquist, 433 N.W.2d 207, 212 (N.D. 1988). "The task of the issuing magistrate is to make a practical, commonsense decision whether, given all the information considered together, there is a fair probability contraband or evidence of a crime will be found in a particular place." State v. Rydberg, 519 N.W.2d 306, 308 (N.D. 1994).

[¶25] Following Detective Witte's testimony at the evidentiary hearing Judge Irby wrote the following in his Memorandum Opinion and Order Denying the Motion to Suppress:

[6] Based on the language in the warrant and the totality of circumstances, there was probable cause for the warrant. Detective Witte had prior knowledge of Mr. Zeller based on a past case, but one that could not be proven. The concerned citizen in this case relayed specific information about the building, along with specific behavior that was unusual for the neighborhood. The citizen also described the traffic being unusually high, especially on weekends. The citizen also obtained license plates of the cars that were parking in front of the building for a short period of time. The license plate numbers pointed to a Mr. Gust, in which the officer had past experience with and his drug habits, and the case file was opened. A criminal informant was then used to conduct a controlled buy from Mr. Gust. This buy was detailed in the affidavit for the warrant, describing the place where the car stopped, and an officer seeing Mr. Gust in the alley behind the building in question. The criminal informant was searched prior to the buy, and had nothing on him. When the buy was over, the criminal informant handed over the narcotics to the officer, and they confirmed it was methamphetamine. Mr. Gust was then later pulled over, and more drugs were found in the car, but the money for the controlled buy was not in the car. Along with this evidence, there was a cell phone text from Todd Z, who was later confirmed to be Todd Zeller of 114 24th Street South. The fact that the money was not in the car, along with the officer's past dealings with Mr. Zeller, and a cell phone text from Mr. Zeller whose building Mr. Gust was spotted behind when obtaining the drugs for the buy, there is ample information with detail to establish that a crime was probably occurring within 114 24th Street South. Given the totality of the circumstances, the information adds up to establishing probable cause for the search of 114 24th Street South.

(Appellant's App. at 20.)

[¶26] Zeller's discussion of citizen, confidential and anonymous informants is all very interesting, but it has no legal relevance to this case. Because it has no legal significance Judge Irby's Memorandum Opinion and Order Denying the

Motion to Suppress does not even address it. The fact that a confidential informant is mentioned does not make the confidential informant relevant to a probable cause determination. Zeller simply fails to show how law enforcement relied on any information presented by the confidential informant. Zeller fails to show how any statement by the confidential informant played any part in the determination of probable cause.

[¶27] The totality of the facts and circumstances articulated by Detective Witte to Judge Marquart in Exhibit B made it probable that Gust had gone to Todd Zeller's residence at 114 24th Street South to obtain methamphetamine; that Gust had probably paid to Zeller recorded Fargo Police Department buy monies for methamphetamine; and that evidence of criminal activity would probably be found in Zeller's residence at 114 24th Street South.

II. [¶28] Whether the district court erred in denying Zeller's motion to suppress because Detective Witte's Exhibit B was false and misleading.

[¶29] Zeller argues Witte falsely cited enhanced safety as the reason for the nighttime service request; Witte failed to disclose that the confidential informant was not shown to be sufficiently reliable; and Witte failed to disclose that Gust had stopped at a drive-through restaurant before Gust was arrested. Zeller presented these are the same arguments to Judge Irby at the second motion hearing on July 29, 2013. Judge Irby stated:

All right. All right. Well, I have reviewed the State's response to this and find that the reasoning set forth by the State is compelling,

and I will adopt – basically the reasoning, therefore denying the request for a Frank’s Hearing.

Not every fact in the – or statement in the Affidavit to Support Probable Cause has to support probable cause. Some of it is – in fact, could be surplusage. There was nothing about the nighttime service that would have detracted from the probable cause that was previously found. The Confidential Informant was wired, and even without the drive up window facts in there, still probable cause would have been found to support the issuing of that warrant. So I am going to deny that.

(7/29/13 Tr. 10:22-11:10.)

[¶30] The standard for evaluating allegations that law enforcement made false or misleading statements in an affidavit support a search warrant has been laid out by the Supreme Court:

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit’s false material set to one side, the affidavit’s remaining contents is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

State v. Rydberg, 519 N.W.2d 306, 308-09 (N.D. 1994). See also Franks v. Delaware, 438 U.S. 154, 155-56 (1978). Under Franks a false affidavit misleads a magistrate into believing certain facts exists, and those facts affect the probable cause determination. State v. Rangeloff, 1998 ND 135, ¶ 9, 580 N.W.2d 593, 597. The standard set out in Franks also applies to deliberately false or misleading

omissions. Id. “However, ‘for an omission to serve as the basis for a hearing under Franks, it must be such that its inclusion in the affidavit would defeat probable cause.’” Id. (citations omitted).

[¶31] Judge Irby did not find that Detective Witte made any false statements or misleading omissions. Assuming for the sake of argument Detective Witte did make false statements or misleading omission, none of the allegedly false statements or allegedly misleading omissions would defeat the probable cause otherwise established by the totality of the remaining facts and circumstances set forth in Exhibit B.

A. [¶32] Witte’s assertion that nighttime service would be safer.

[¶33] Zeller argues Witte’s affidavit requesting authorization to serve the warrant at night was knowingly or intentionally false, or was made with reckless disregard for the truth. Furthermore, Zeller argues these statements were necessary to a finding of probable cause. The request for nighttime authorization states in full:

Your affiant further would like to request “Nighttime Service Authorized” to allow officers the ability to get closer to the residence before being detected under the cover of darkness. Your Affiant notes that the entry of law enforcement in this manner will be safer to those inside as well as the law enforcement officers executing the search warrant. Your Affiant notes this methamphetamine transaction occurred between the hours of 10 p.m. and 11 p.m. and the investigation is ongoing. Your Affiant notes this information was developed in the late hours of November 16th and early morning hours of November 17, 2012.

Appellant’s Appendix at 16.

[¶34] Zeller claims Witte misled the magistrate judge in light of his testimony at the evidentiary hearing indicating he did not believe safety concerns are an actual reason for a nighttime warrant, or that he believed nighttime service provides more safety. (5/7/13 Tr. 11: 4-12.) Of course, Zeller ignores the nuances of the balance of Witte's testimony on the safety issue. (5/17/13 Tr. 11: 13 to 14: 12). At best, Zeller's argument would effectively excise the first two sentences of the request for nighttime authorization cited above. These two sentences are not necessary to the finding of probable cause to justify the authorization of a nighttime search. The magistrate judge would be left with knowledge that the methamphetamine transaction occurred during nighttime hours.

[¶35] Witte's affidavit indicates the transaction occurred during nighttime hours. (5/7/13 Tr. 17:6-25; 18:1-5; 19:7-12). Witte was concerned the evidence and buy fund money would disappear. (5/7/13 19:13-20.) Chief Justice Vande Walle contemplated such a scenario in his special concurrence in State v. Fields, stating "evidence that a subject of a search warrant consumed or delivered drugs within a few hours of their receipt or made deliveries in the nighttime hours would justify issuance of a nighttime search warrant." 2005 ND 15, ¶ 18, 691 N.W.2d 233. In light of Berger and Chief Justice Vande Walle's special concurrence in Fields, sufficient probable cause was present to justify the authorization of a nighttime search warrant, even after excising the allegedly misleading portions of the affidavit.

B. [¶36] Failure to disclose the credibility and experience of the confidential informant.

[¶37] Zeller argues Witte's affidavit was misleading by omission because it did not state that the confidential informant was a member of the criminal milieu. If Witte had included additional information about the confidential informant, then that inclusion would not have defeated probable cause because of all the other facts articulated by Witte. The confidential informant wore an audio/transmitting device during the transaction with Gust, which was removed at the conclusion of the controlled-buy. (Appellant's App. at 15). Law enforcement listened in on the confidential informant's transaction with Gust. Law enforcement then corroborated what it heard and what the confidential informant told law enforcement with Gust's arrest. An omission of the fact that a confidential informant is charged with a crime and is cooperating with law enforcement for leniency does not mislead a judge, nor is its absence critical to a probable cause determination. State v. Holzer, 2003 ND 19, ¶ 13, 656 N.W.2d 686. Details outlining the reliability, experience, and motivation of the confidential informant would not have served to defeat the probable cause found in this case.

C. [¶38] Failure to disclose the actions of Gust after the controlled-buy.

[¶39] Zeller argues Witte's affidavit was misleading by omission in that it did not state Gust stopped at a drive through restaurant before he was arrested. If Witte had included in his affidavit a statement indicating Gust stopped at a drive through restaurant before he was arrest, then such a statement would not defeat

probable cause in light of all the other factors and circumstances outlined in the affidavit.

III. [¶40] Whether there was probable cause for nighttime service of the search warrant.

[¶41] Zeller argues that Witte's Exhibit B failed to establish probable cause for nighttime service of the search warrant.

[¶42] Under N.D.R.Crim.P. 41(c)(1)(E), a warrant must be served during the day time unless, based on reasonable cause, it is authorized to be executed at times other than day time. Daytime is considered the hours from 6:00 a.m. to 10:00 p.m. N.D.R.Crim.P. 41(h)(2)(B). Reasonable cause and probable cause are interchangeable. State v. Knudson, 499 N.W.2d 872, 875 (N.D. 1993). A nighttime search warrant requires a separate showing of probable cause necessitating the need to execute the warrant at a time other than the daytime. State v. Fields, 2005 ND 15, ¶ 9, 691 N.W.2d 233.

[¶43] The purpose of the rule is to protect citizens from the trauma of unwarranted nighttime searches. These searches constitute a greater intrusion on privacy interests than daytime searches. State v. Schmeets, 278 N.W.2d 401, 410 (N.D. 1979). Probable cause for a nighttime search exists upon a showing that evidence may be quickly and easily disposed. State v. Knudson, 499 N.W.2d 872, 875 (N.D.1993). This Court has rejected a per-se rule justifying nighttime warrants in drug cases. State v. Fields, 2005 ND 15, ¶ 10, 691 N.W.2d 233. "An

officer must set forth some facts for believing the evidence will be destroyed other than its mere existence.” Id.

[¶44] In State v. Berger, this Court upheld a nighttime warrant because the marijuana and marked bills used to purchase the marijuana could be easily removed or destroyed, given the transaction had occurred earlier the same night the warrant was sought. 285 N.W.2d 533, 534-38 (N.D. 1979).

[¶45] In State v. Habbena, 372 N.W.2d 450 (S.D. 1985) the South Dakota Supreme Court considered the defendant’s contention that no reasonable cause existed for execution of a search warrant at night. The Court stated:

During his call to Magistrate Matheson at 8:39 p.m., Boos requested that the warrant be executed immediately. Matheson authorized the immediate execution. The trial court found that “reasonable cause” existed for a nighttime execution. In reading an affidavit, this court draws “every reasonable inference possible in support of the magistrate's determination.” State v. Wellner, 318 N.W.2d 324, 327 (S.D.1982). The unusual nighttime service only requires the issuing authority be convinced that such nighttime service is reasonable under the circumstances. See United States v. Gibbons, 607 F.2d 1320 (10th Cir.1979). Nighttime execution of a search warrant is the exception, not the rule. A statutory rule preferring daytime execution is designed to prevent a surprise midnight invasion of a defendant's home. See State v. Lien, 265 N.W.2d 833 (Minn.1978). But when the need for protection against surprise is not present, nighttime service may be necessary to insure a safe and successful search. Due to the transient nature of the items sought here, both the magistrate and the trial judge concluded that the requisite “reasonable cause” existed for nighttime service, and we agree.

State v. Habbena, 372 N.W.2d at 457.

[¶46] In articulating the reasons behind the request for nighttime service Det. Witte indicated that the methamphetamine transaction had occurred just hours

earlier between 10 p.m. and 11 p.m. The methamphetamine transaction in which Gust had been involved took place after 10 p.m. and Judge Marquart authorized the Search Warrant at 3:25 a.m. on the following morning. It was reasonable for Judge Marquart to authorize nighttime service because time was of the essence. Not all the monies which the confidential informant had paid to Gust were recovered from Gust when the Fargo Police Department arrested and searched Gust. The longer the Fargo Police Department waited, the greater the likelihood that the Fargo Police Department buy-monies would not be recovered. The missing Fargo Police Department buy-monies were more likely to be recovered if law enforcement acted immediately. The need for immediate execution resulted in the request for nighttime authorization. Judge Marquart considered the request reasonable and granted it.

[¶47] **CONCLUSION**

[¶48] For the foregoing reasons, the District Court's Memorandum Opinion and Order Denying the Motion to Suppress dated June 7, 2013, and Order Denying Motion dated August 5, 2013, should be affirmed.

Respectfully submitted this 21st day of January, 2014.

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[¶49] CERTIFICATE OF SERVICE

[¶50] A true and correct copy of the foregoing document was sent via e-mail on the 21st day of January, 2014, to: Jesse Lange @ officemanager@aalandlaw.com and jesse@aalandlaw.com.

Mark R. Boening